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October 25, 2021

Via ECF

Honorable Edgardo Ramos
United States District Judge
United States Courthouse
40 Foley Square
New York, NY 10007

Re: *United States v. Neil Cole,*
19 Cr. 869 (ER)

Dear Judge Ramos:

Although we understand that Your Honor's general practice is to provide a copy of the indictment to the jury, we respectfully submit that, under the circumstances of this case, submitting the indictment to the jury is unnecessary and unfairly prejudicial. The 37-page, speaking indictment is not a "plain, concise" statement of the "essential facts constituting the offense charged." Fed. R. Crim. P. 7(c). It is a piece of persuasive writing setting forth the government's interpretation of the evidence, with descriptive headings and extraneous detail designed to persuade the reader of Mr. Cole's guilt. At a minimum, the jury should receive only a redacted version of the indictment that is limited to the statutory charges.

The Second Circuit has cautioned against sending indictments into the jury room, "particularly when the indictment does not merely state the statutory charges against the defendant, but additionally contains a running narrative of the government's version of the facts of the case, including detailed allegations of facts not necessary for the jury to find in order to address the elements of the charged offenses." *United States v. Esso*, 684 F.3d 347, 352 n.5 (2d Cir. 2012); see also *United States v. Van Dyke*, 14 F.3d 415, 423 (8th Cir. 1994) ("[T]he indictment, as the government's formal charging document, gave the jury a one-sided view of the case."); *Getchell v. United States*, 282 F.2d 681, 689–90

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(5th Cir. 1960) (“T]he long recital of the prosecution's theory of fraud contained in the indictment tended to prejudice the defendants.”); *United States v. Ogbazion*, No. 3:15-CR-104, 2021 WL 3847829, at *17 (S.D. Ohio Aug. 27, 2021) (recognizing that “error may arise from allowing a deliberating jury to see and consider superfluous information, unnecessary to its consideration of the offense at issue”).

Accordingly, a number of courts in this District have adopted a general “practice [not] to give ‘speaking’ indictments to the jury,” while others do not send back any indictment, whether speaking or not. *United States v. Tuzman*, 301 F. Supp. 3d 430, 453 (S.D.N.Y. 2017) (Gardephe, J.); *see United States v. Butler*, 351 F. Supp. 2d 121, 124 (S.D.N.Y. 2004) (Lynch, J.); Trial Tr. at 2107–08, *United States v. Petit*, No. 19 Cr. 850 (JSR) (S.D.N.Y. Nov. 11, 2020), ECF NO. 185. Given that the purpose of providing the indictment to the jury is “to facilitate deliberation,” *United States v. Shellef*, 732 F. Supp. 2d 42, 82 (E.D.N.Y. 2010), there is no reason to include extraneous material that would not assist jurors in keeping straight the different charges and the elements they contain. A redacted version limited to the statutory language would achieve that objective.

In addition to containing unnecessary detail, the indictment in this case includes allegations that are unsupported by the evidence and, in some instances, objectively false. The indictment alleges, for example, that Mr. Cole “touted Iconix’s consistent record of . . . meeting or exceeding Wall Street analyst consensus with respect to [revenue and EPS].” Indictment ¶ 12. We are aware of no factual basis for that claim, and there certainly is nothing in the trial record to support it. The indictment also makes the incorrect assertion that Seth Horowitz was the Chief Operating Officer at all times relevant to the indictment when, in fact, he did not become COO until April 2014. Further, the indictment includes express references to information that the Court excluded under Rule 403 due to the risk of unfair prejudice. *See* Indictment ¶ 64.

Rather than visibly redacting the indictment and thus “arous[ing] the jury’s curiosity, stimulat[ing] unwarranted speculation, and invit[ing] confusion in deliberations,” or redrafting the indictment from scratch to avoid visible redactions and thus drastically altering the charging instrument without resubmitting it to the grand jury, the best course is simply not to submit the indictment. *United States v. Fawwaz*, No. S7 98-CR-1023 LAK, 2015 WL 2114914, at *3 (S.D.N.Y. May 6, 2015).

Accordingly, we respectfully submit that the Court should decline to provide a copy of the indictment to the jury or, at a minimum, provide only those portions reciting the relevant statutory language.

Respectfully submitted,

/s/ Lorin L. Reisner

Lorin L. Reisner

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